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Use of Warrants for Breath Test Refusal: Case Studies

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16. Abstract This study investigated the use of warrants to obtain blood samples from drivers arrested for alcohol-impaired driving and who refuse to provide breath samples when requested to do so by law enforcement officers. Case studies were conducted in four States: Arizona, Michigan, Oregon, and Utah. Meetings and discussions with law enforcement officers, prosecutors, defense attorneys, judges, and officials in the Department of Public Safety or the Governor's Highway Safety Office provided a thorough picture of each State's experience with warrants, documented in a separate chapter for each State. Telephone interviews were conducted with key contacts in California and Nevada, two States in which warrants are not required to obtain blood samples from drivers who have refused requests for breath samples. The final chapter summarizes and synthesizes the information and conclusions from all case study States.					
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Executive Summary

Background

The amount of alcohol in a driver's blood is an important piece of evidence in demonstrating the influence of alcohol on a driver's ability to operate a vehicle safely. In all States, a blood alcohol concentration (BAC) level of .08 grams per deciliter (g/dL) is per se evidence of driving while impaired (DWI). Many prosecutors and judges believe that a DWI conviction is more difficult to obtain without a BAC.

Implied consent laws in all States require drivers to provide some form of BAC evidence, typically through a breath test when requested by a law enforcement officer. Drivers may refuse this request. In some States, the sanctions for refusal are less severe than the sanctions for a DWI conviction. Hence, it may be to a driver's advantage to refuse the test. A recent report documented that about one-quarter of all drivers arrested for DWI in 40 States and the District of Columbia from 1996 to 2001 refused the BAC test.

To reduce breath test refusals, increase the proportion of drivers with BAC evidence, and increase the number of drivers successfully prosecuted for DWI, some States use search warrants. If a driver refuses to provide a breath test, the arresting officer contacts a magistrate or judge, obtains a warrant that requires the driver to provide a blood sample, and then arranges for the blood sample to be drawn, by force if necessary. The procedures for warrants and the situations in which warrants are used differ from State to State. The National Highway Traffic Safety Administration is aware of six States that used warrants extensively for BAC test refusals in at least one jurisdiction in 2006.

Study Goals and Methodology

The study's goal was to describe how warrants are used in four States – Arizona, Michigan, Oregon, and Utah – selected because some jurisdictions in each State use warrants extensively. Researchers met with selected law enforcement officers, prosecutors, defense attorneys, judges, and officials in the Department of Public Safety or the Governor's Highway Safety Office in each State. All people interviewed had extensive experience with the use of warrants. They do not constitute a random sample of all people holding these positions throughout any study State. Researchers also obtained copies of relevant legislation, law enforcement policies and procedures, warrant forms and affidavits, and reports. In addition, researchers conducted telephone interviews with key contacts in California and Nevada, two States in which warrants are not needed to require drivers arrested for DWI to provide blood samples.

Legal Basis of Warrants

Arizona and Michigan laws specifically authorize warrants in cases of BAC test refusal. Oregon's law has been interpreted to provide the same authorization. Utah derives the authority from case law. Nevada and North Carolina laws, and California case law, allow blood samples to be obtained without warrants from drivers who refuse breath tests.

Use of Warrants in 2006

The four case study States use warrants in different situations.

- Arizona: some jurisdictions use warrants for all BAC test refusals and most jurisdictions use them for some refusals.
- Michigan: most county prosecutors have policies that require law enforcement officers to obtain warrants for all BAC test refusals, including first offenders.
- Oregon: law enforcement officers in a few counties use warrants for some BAC test refusals.
- Utah: warrants are used statewide, more commonly in some areas than in others.

The Warrant Process

The process for obtaining a blood sample from a DWI suspect is similar in all four case study States. The driver is arrested for DWI and is asked for a breath sample. The driver is informed of the State's implied consent provisions and penalties. If the driver refuses to provide a breath sample, the officer proceeds to request a warrant for a blood sample. The officer first completes standard affidavit and warrant forms. In some jurisdictions, the officer contacts an on-call prosecutor; in others, the officer immediately contacts a judge or magistrate. The forms can be faxed to the judge or magistrate for signature, or the warrant can be sworn by telephone.

Once the warrant is granted, the driver is required to provide a blood sample. In Michigan and Oregon, the driver is taken to a facility where a qualified medical practitioner (physician, nurse, emergency medical technician [EMT], or phlebotomist) draws a blood sample, or a qualified person is called to the police station to draw the sample. In Arizona and Utah, a number of law enforcement officers have been trained and certified as phlebotomists and are authorized to draw blood samples. They typically draw the blood sample at the police station, eliminating the need to transport the driver to a medical facility. If a law enforcement phlebotomist is not available, blood can be drawn by medical personnel as in Michigan and Oregon. In all States, the driver will be charged with and will face the penalties for a BAC test refusal, in addition to potential charges and penalties for DWI. ✓

Advantages of Warrants

Judges and prosecutors interviewed in all four case study States strongly agreed that the driver's BAC is a valuable piece of evidence in court and can make the difference between a guilty plea and a trial. BAC evidence is critical in States with "extreme DWI"¹ laws that provide additional penalties for drivers with a BAC exceeding a level such as .15 or .16 g/dL. Judges and prosecutors interviewed strongly supported warrants, to the extent of volunteering to answer the telephone in the middle of the night to issue a warrant. They agreed that warrants have reduced breath test refusals and increased the proportion of DWI cases with BAC evidence in their jurisdictions. This in turn has produced more guilty pleas, fewer trials, and more convictions.

¹ Also known as "High BAC" laws or "Aggravated BAC" laws in some States.

Law enforcement officers interviewed in case study States generally supported the use of warrants. They are willing to take the additional time that the warrant process requires in order to obtain BAC evidence.

Disadvantages of Warrants

The major disadvantage of warrants reported by the people interviewed is the additional time required to obtain the warrant and the blood sample. It can take an officer an extra 90 to 120 minutes or more to complete the warrant forms, transmit the information to a judge for signature, transport the suspect to a medical facility or call a phlebotomist to the station, and obtain the blood sample. Law enforcement phlebotomists can eliminate both the need to transport the driver to and from a medical facility and the time spent waiting for the blood sample to be drawn.

People interviewed noted that the use of law enforcement phlebotomists may raise a risk of unexpected medical complications from a blood draw in a police station, with no physician or other medical staff present. No such instances have been reported in Arizona or Utah, the two States in which law enforcement phlebotomists are used. Law enforcement officer phlebotomists should receive complete and thorough training and regular recertification to ensure they maintain their qualifications and are able to draw blood in a safe and professional manner.

People interviewed suggested that some members of the public may believe that law enforcement phlebotomists provide an opportunity for police harassment. Again, procedures for law enforcement phlebotomists should be clearly defined and followed. No questions of harassment have been reported in Arizona or Utah.

Conclusions

Each case study State uses warrants for some drivers arrested for DWI who refuse breath tests. The main differences in warrant procedures across the four States are:

- How warrants are authorized: by statute (Arizona, Michigan), by interpretation of statute (Oregon), or through case law (Utah).
- How the system is structured: with common procedures statewide (Arizona and Utah) or with county-level procedures (Michigan and Oregon).
- Where and how frequently warrants are used:
 - statewide, quite extensively, for all refusals in major jurisdictions (Arizona);
 - in most counties, quite extensively, for all refusals in many counties (Michigan);
 - statewide, primarily through the Highway Patrol (Utah);
 - in a few counties (Oregon).
- Who draws blood: medical personnel (Michigan and Oregon) or law enforcement phlebotomists (Arizona and Utah).

Each State's system is now well accepted in the jurisdictions in which it operates. In each State, the people interviewed agreed that warrants have reduced breath test refusals and produced BAC evidence in more DWI cases. This in turn has produced more pleas, fewer trials, and more convictions.

The major reported disadvantages of a warrant system are the additional time required for a law enforcement officer to obtain a warrant and collect a blood sample and the cost of analyzing the blood sample. One way the additional time can be reduced is if trained law enforcement phlebotomists are used to draw blood samples.

People interviewed reported that some judges are not satisfied that cases of "simple DWI" justify the use of warrants to obtain BAC evidence. The full support of judges and prosecutors is critical to the successful use of warrants in any jurisdiction.

1. Introduction

Background

The amount of alcohol in a driver's blood is an important piece of evidence in demonstrating the influence of alcohol on a driver's ability to operate a vehicle safely. In all States, a blood alcohol concentration (BAC) level of .08 g/dL is per se evidence of alcohol-impaired driving, usually called driving while impaired (DWI)². More than half the States have enacted extreme or aggravated DWI laws with more severe sanctions for drivers with a BAC exceeding a higher level, typically .15 or .16 g/dL.

Law enforcement, prosecutors, and judges rely on BAC evidence to help charge and prosecute drivers for DWI. Without a BAC, the evidence supporting a DWI charge is limited to an officer's observations of the driver's behavior on the road, visible signs of intoxication, and the driver's scores on the Standardized Field Sobriety Tests (SFST). Without a BAC, drivers may not be charged properly under extreme DWI laws and repeat DWI offences. Many prosecutors and judges believe that a DWI conviction is more difficult to obtain without a BAC.

Implied consent laws in all States require drivers to provide BAC evidence when requested by a law enforcement officer. This evidence usually is obtained from a breath test, though some States allow an officer to request a blood or urine sample.

Drivers may refuse an officer's request for a breath test (or a blood or urine sample). In some States, the sanctions for refusal are less severe than the sanctions for a DWI conviction. In most States, the sanctions for refusal are less severe than the sanctions for conviction under an extreme DWI law or for a repeat DWI offender. Hence, it may be to a driver's advantage to refuse to take the breath test.

A recent report documented breath test refusal sanctions and refusal rates in the States. Across the 41 jurisdictions – 40 States and the District of Columbia – for which test refusal data were available, about one-quarter of all drivers arrested for DWI from 1996 to 2001 refused to provide a breath test. The refusal rates varied markedly from State to State. In 2001, California reported the lowest refusal rate of 5.3%, while refusal rates in New Hampshire and Rhode Island exceeded 80%.³

The report also documented reasons for breath test refusals through case studies of five States, four of which had 2001 refusal rates above the national average, and the report suggested potential strategies for reducing refusals. It reported that in one jurisdiction in Louisiana, one of the case study States, judges would issue warrants to obtain a blood sample from some drivers arrested for DWI who refused to provide a breath test. The report noted that laws in 10 other States

² The various offenses of driving under the influence of alcohol or other substances, used generically in this report without reference to a specific State; also the term used for these offenses in Arizona and Utah. Some States use the term "driving while intoxicated" (DWI); the terms may be used generically and interchangeably here.

³ Zwicker, T.J., Hedlund, J., & Northrup, V.S. (2005), "Breath Test Refusals in DWI Enforcement: An Interim Report," HS 809 876, p. 6. Washington, DC: National Highway Traffic Safety Administration.

allow warrants in all DWI cases while laws in many other States authorize a BAC test to be obtained by force if necessary in some circumstances, for example in serious-injury or fatal crashes where there is probable cause to believe that a driver was impaired by alcohol. The report concluded that the use of warrants when authorized may be an effective strategy to provide BAC evidence for more DWI offenders.

Study Goals and Methodology

This study provides detailed information on the use of warrants in four States: Arizona, Michigan, Oregon, and Utah. These four States were selected because some jurisdictions in each State were known to use warrants extensively.

The basic process for using warrants is straightforward. If a driver is arrested for DWI and refuses to provide a breath test (or a blood or urine sample), the arresting officer contacts a magistrate or judge, obtains a warrant that requires the driver to provide a blood sample, and then arranges for the blood sample to be drawn. However, the procedures for warrants and the situations in which warrants are used differ from State to State.

The study's goal was to describe how the four case study States use warrants. To obtain this information, researchers met with 12 to 15 people in each State, including law enforcement officers, prosecutors, defense attorneys, judges, and officials in the Department of Public Safety or the Governor's Highway Safety Office. They obtained copies of relevant legislation, law enforcement policies and procedures, warrant forms and affidavits, and reports. In addition, the researchers conducted telephone interviews with key contacts in California and Nevada, two States in which warrants are not needed to require drivers arrested for DWI to provide a blood sample.

By design, the researchers interviewed law enforcement officers, prosecutors, defense attorneys, judges, and State officials selected for their extensive experience with the use of warrants. The people interviewed do not constitute a random sample of all people holding these positions throughout any study State. The observations and conclusions based on these interviews and on the other information obtained in each State attempt to provide an accurate description of the use of warrants in the State, and these observations and conclusions have been reviewed by the State's highway safety office, but they may not apply to all jurisdictions within the State. They do not claim to represent the views of all law enforcement officers, prosecutors, defense attorneys, or judges throughout the State.

This study design did not allow for obtaining data on breath test refusal rates or the number of trials, pleas, or convictions in the study States. Any changes in breath test refusals, trials, pleas, or convictions noted in this report are based on the beliefs of the people interviewed in each State.

Contents of this Report

Following a brief discussion of the study's methodology, each study State is described in a separate chapter. Each State's description includes the legal basis for warrants, how and when warrants began to be used, and the extent of warrant use in 2006. The warrant process is described in detail, including how the possibility of a warrant is presented to the driver, how an officer contacts a judge or magistrate to seek a warrant, how and by whom the blood sample is drawn, and where the blood sample is sent for BAC analysis. The effects of the warrant system on various measures are described: breath test refusals, the proportion of DWI offenders with BAC evidence, and DWI pleas, trials, and convictions. Warrant system costs, in both dollars and time, are summarized. Each chapter summarizes the views of those interviewed regarding the warrant system and their suggestions for improving the system in their State. The chapters for Arizona and Michigan, the two States with substantial experience with the use of warrants in many jurisdictions, conclude with recommendations of those interviewed for other States interested in considering the use of warrants.

The experiences of California and Nevada, the two States in which warrants are not needed, are summarized briefly in the following chapter. The law through which North Carolina joined California and Nevada as of December 1, 2006, is provided.

The final chapter synthesizes and summarizes the experiences with and the costs and benefits of warrants across all study States. It provides suggestions for States that may wish to consider using warrants.

Acknowledgments

The information in this report comes from personal interviews and telephone conversations with over 60 law enforcement officers, prosecutors, defense attorneys, judges, and others in six States as well as with officials and staff in six State highway safety offices and four NHTSA Regional offices. The authors thank everyone who generously gave of their time and expertise to provide information, answer questions, and review drafts.

2. Methodology

State Selection

The study sought to document the use of warrants in several States. NHTSA is aware of six States that used warrants extensively for BAC test refusals in at least in one jurisdiction in 2006. The study design allowed four of these to be studied. Some jurisdictions in each study State had substantial experience with the use of warrants. The procedures used for warrants varied across the four States, so that collectively they provide a thorough overview of how States use warrants.

Researchers contacted each NHTSA Regional Administrator, explained the study's goals, and obtained information on States within the Region that use warrants for blood draws. With the information gained from these conversations and other information from individual State Offices of Highway Safety, NHTSA selected four States for full case studies – Arizona, Michigan, Oregon, and Utah – and two additional States for telephone contact – California and Nevada.

Case Study Procedures

Researchers contacted the NHTSA Regional Administrators in the Regions of all six study States to obtain their advice on the study. The researchers then contacted the Governor's Representative or Coordinator for each of the four full case study States and described the study (see Appendix A for the one-page study outline used). The Governor's Representative or Coordinator designated a primary study contact in the State. The researchers then conducted a telephone interview with this contact to discuss the study in detail and to obtain an overview of the State's warrant use and process (see Appendix B for the outline used in this and subsequent interviews). They explained that they wished to visit the State and conduct personal interviews with judges, prosecutors, defense attorneys, law enforcement officials, and others who have experience with the use of warrants in the State. The primary contact then proposed interview candidates.

After the primary contact and a researcher agreed on a date for the visit, the primary contact scheduled interviews. Between 12 to 20 people were interviewed in each State, many in individual interviews, some in small groups such as two law enforcement officers or three judges. Judges, prosecutors, law enforcement officers, defense attorneys, and State officials were interviewed in each State. In Oregon, a researcher attended a meeting of the Governor's Advisory Committee and discussed warrants with the Committee chair, an official from the Department of Motor Vehicles, a toxicologist, a retired defense attorney, and several citizen activists. In Arizona, a researcher attended a roll-call briefing of seven patrol officers and conducted a group discussion of warrants.

Appendix B gives the overall outline of discussion topics. The researchers adapted the topics for each interview to the person being interviewed and the time available, with detailed questions in areas of the interviewee's knowledge and experience. Interviews ended with open-ended questions on the interviewee's overall opinions regarding warrants and any advice for other jurisdictions or States interested in considering warrants. Group interviews tended to be less structured due to time constraints. All interviews were conducted "on background" so that information and

opinions from interviews are not attributed to specific individuals but only to categories of individuals, such as law enforcement officers in a State.

The research team then drafted a report on each State. The draft report was reviewed for accuracy and completeness by staff in the Governor's Representative's office and other people suggested by the Governor's Representative's office and was revised as appropriate. These revised reports constitute Chapters 3 through 6 of this report.

For California and Nevada, a researcher conducted a telephone interview with the primary study contact. From the information gained he drafted a brief report on the State's law authorizing blood tests and the effects of this law. The contacts in each State reviewed their State's draft report and revised as appropriate. These revised reports are contained in Chapter 7.

3. Arizona

Overview

Arizona uses warrants extensively statewide. Some jurisdictions, including Phoenix, Peoria, and Scottsdale, obtain a warrant and a blood sample for virtually every driver arrested for DUI (driving under the influence of alcohol or drugs) who refuses a breath test. Key characteristics of Arizona's system include:

- Laws that allow a warrant and blood draw for any alcohol test refusal in any DWI situation and that allow an arresting officer to choose either a breath or blood test;
- A substantial number of law enforcement officers who are trained phlebotomists and who perform most of the blood draws authorized by warrant;
- Judges who encourage warrants and who cooperate in issuing warrants at all hours of the day and night;
- Prosecutors and district attorneys who have established policies encouraging warrants;
- Laboratories that analyze blood samples quickly; and
- The Governor's Office of Highway Safety (GOHS), which works with all parties to establish a comprehensive and cooperative system and which provides both startup and continuing funding for key activities.

This report is based on discussions with law enforcement officers, prosecutors, defense attorneys, judges, and highway safety officials in the Phoenix area. Some observations and conclusions may not apply to all jurisdictions in Arizona. The statements in this report do not necessarily represent the views of all law enforcement officers, prosecutors, defense attorneys, or judges throughout Arizona.

Laws

Arizona's implied consent law (§28-1321) requires a driver arrested for DUI to submit to a test to determine the BAC. A law enforcement officer may choose to test the driver's breath, blood, urine, or any other bodily substance, and may require more than one test. If the driver refuses, the officer may seek a warrant for a test. A warrant is not required for a driver involved in a fatal or serious injury crash, but most law enforcement officers and prosecutors prefer to have a warrant in these situations. A blood sample for a BAC test must be obtained by "a physician, a registered nurse, or another qualified person."

Administrative penalties for test refusal are strict: a mandatory one-year license suspension for a first refusal and a two-year suspension for a second or subsequent refusal. The basic administrative license suspension for failing a test with a BAC over .08 is 30 days for a first offense and 90 days for a second or subsequent offense.

Arizona has an "extreme DUI" law (§28-1382) for drivers with a BAC exceeding .15. Sanctions include 30 days in jail, fines, and an alcohol interlock requirement for any vehicle that the driver operates after the required license suspension period has been served.

Appendix C contains key sections from Arizona's laws.

How Arizona's Warrant System Began and Spread

Arizona's laws authorizing warrants have been in effect for some time but warrants were sought only rarely before the mid-1990s. At that time, jurisdictions including Phoenix, Peoria, and Scottsdale began to use warrants for some more serious DUI arrests. At about the same time, the Arizona Department of Public Safety (DPS) began training law enforcement officers as phlebotomists. The results were so positive that the use of warrants spread. The Maricopa County Attorney established a policy that felony DUI cases (those involving a serious injury or fatality, a repeat DUI offender, a driver with a suspended license, or a driver with a child in the vehicle) would not be prosecuted if the driver had refused a BAC test and a warrant had not been sought. As a result, Phoenix soon began obtaining warrants for all BAC test refusals. As more DPS officers were trained as phlebotomists, the use of warrants spread throughout the State.

As of 2006, some Arizona jurisdictions, including Phoenix, Peoria, and Scottsdale, use warrants for almost all BAC test refusals. Phoenix defense attorneys and prosecutors who were interviewed "cannot remember the last refusal case where there was no warrant." Judges who were interviewed report that cases with a refusal and no warrant are "very rare." Some police agencies have established policies that require officers to obtain warrants for all test refusals. The Arizona DPS uses warrants in many of their test refusal cases. DPS also will provide a DPS phlebotomist when possible to assist smaller police agencies throughout the State that do not have their own phlebotomists. While there are no statewide data on BAC test refusals and warrants, most Arizona agencies use warrants for some refusals and some agencies, including the major cities noted above, seek and obtain warrants for virtually all refusals.

How Arizona's Warrant System Operates

The DUI arrest and the warrant. After a driver has been arrested for DUI, the driver is taken to the police station (or, in Phoenix and some other jurisdictions, to a mobile DUI van). The driver is asked for a breath test. If the driver refuses, an officer reads the implied consent provisions and tells the driver that continuing to refuse means the officer will contact a judge and request a warrant for a blood test. The driver has the right to contact an attorney before deciding whether to take the breath test, but very few do. The driver can decide to take the breath test until a judge is contacted; after a judge has been contacted and the warrant process has begun, the driver must provide a blood sample. See Appendix D for Phoenix police DUI policies and procedures.

If the driver continues to refuse, an officer then contacts a judge and requests a warrant. Officers have a list of judges in their jurisdictions who are available and willing to provide warrants, so officers rarely have difficulty locating a judge. In Phoenix, an Initial Appearance Judge is present at the Maricopa County jail at all times (24 hours a day, 7 days a week) and is called for most warrants. The Maricopa County Initial Appearance Judge can issue warrants statewide and can be used if a local judge is not available for refusals in other jurisdictions. The Maricopa County Initial Appearance Judge issues about 2,000 DUI refusal warrants annually.

Most warrants and affidavits are faxed. Police agencies have their own standard “fill-in-the-blank” warrant affidavit form (see Appendix F for the Phoenix form and Appendix H for the DPS form). The officer fills out the fax warrant affidavit and warrant forms, phones the judge, is sworn in, provides details to the judge, and faxes the warrant affidavit and the warrant to the judge (see Appendix J for the standard Arizona search warrant). The judge reviews the affidavit and warrant and, if appropriate, signs the warrant and faxes it back to the officer, who then can proceed to obtain a blood sample. If fax facilities are not available, warrants can be obtained by phone (see Appendix G for the Phoenix telephonic warrant form and Appendix I for the DPS form). Blood is usually drawn by a law enforcement phlebotomist. The blood sample is refrigerated as soon as possible and sent to a laboratory for analysis. The warrant form is returned to the issuing judge or court within three to five days. Appendix E provides the Phoenix police checklist, which includes detailed procedures for obtaining warrants by fax or phone.

The DUI vans used in Phoenix and Mesa consolidate many parts of this procedure. The vans are equipped with a computer and fax machine. All DUI arrest forms, including the warrant form, are linked in the computer, so that information is entered only once and automatically transferred to all forms. A phlebotomist is assigned to each van so the arresting officer does not need to transport the driver anywhere else to draw a blood sample.

Who draws blood: law enforcement phlebotomists. When Arizona began using warrants for BAC test refusals, blood was drawn by a medical phlebotomist, either a nurse or technician at a hospital or other medical facility, or a contract phlebotomist on call or at a police agency. Two difficulties with this system quickly became apparent.

- In some instances it was difficult to access a medical phlebotomist in a timely manner because they were busy, hard to contact, or located far away from the arresting officer and driver;
- If a case went to trial, medical phlebotomists often would fail to appear in court; when they did appear, they often did not provide adequate testimony.

Consequently, in the mid 1990s the Arizona DPS began a phlebotomist training program for law enforcement officers and civilian aides. Training is now provided by four community colleges around the State, using a standard curriculum. The course consists of 20 hours of classroom instruction plus 100 blood draws. It takes approximately one week, at a cost of \$200 per student. Approximately 200 phlebotomists are trained each year (178 in 2005). While there is no state-wide database listing all trained phlebotomists, most Arizona agencies either have phlebotomists on their staff or have easy access to them through nearby agencies or the DPS.

People who have completed this training are recognized as “qualified” to draw blood under Arizona law. The requirements for phlebotomists to retain their qualification vary by agency. These often include a minimum number of blood draws annually (Phoenix requires 24, which can be done at a hospital or medical facility if an officer has not performed enough blood draws on drivers arrested for DUI) and refresher training every one or two years.

The law enforcement officers, prosecutors, judges, and highway safety officials interviewed concluded that law enforcement phlebotomists offer several advantages over medical phlebotomists.

- Law enforcement phlebotomists provide quicker response time, especially when one is assigned to a police agency or DUI van during a high-DUI period.
- Less law enforcement time is required to process a BAC test refusal because drivers do not need to be transported to and from a medical facility, which in rural areas may be many miles away, and wait at the facility while the blood sample is drawn.
- Officers regularly appear in court as part of their normal duties and are trained on how to testify. By contrast, most medical phlebotomists have no experience or training in how to testify in court. Many do not wish to spend the time required to testify.
- Law enforcement phlebotomists can be used to draw blood when required in non-DUI situations, for example where DNA evidence is needed or where a communicable disease may be involved.
- A law enforcement phlebotomist at a crash or arrest scene can draw a blood sample in circumstances where transporting a driver quickly to a police station or medical facility is not possible.
- Overall costs are low: each blood draw requires only a few minutes of the phlebotomist's time and a blood kit costing about \$7.

The people interviewed in Arizona suggested some potential disadvantages or risks to the use of law enforcement phlebotomists.

- Safety risk: because law enforcement phlebotomists do not draw blood at a medical facility, there usually are no physicians or other trained medical personnel available in case of unexpected medical consequences such as uncontrolled bleeding. This risk may be exacerbated in rural areas, when the nearest medical facility is many miles away. No examples of these situations were reported by any of the people interviewed.
- Training and experience: some law enforcement phlebotomists may not be as well trained or experienced in drawing blood as medical personnel. One defense attorney reported a driver with 24 visible puncture marks received as a law enforcement phlebotomist attempted to draw a sample. On the other hand, some people interviewed reported that some medical personnel who draw blood for medical purposes are less qualified than law enforcement phlebotomists who have received the standard training.
- Potential for law enforcement harassment: a warrant authorizes law enforcement to obtain a blood sample by force if necessary. It is possible that officers could fail to explain carefully to a driver (who may not be thinking clearly due to intoxication) that refusal will lead to a warrant, but instead take the driver's initial refusal as justification for a warrant and a forcible blood draw.

Blood sample analysis and reporting. All DUI test refusal blood samples in Arizona are analyzed at laboratories operated by the DPS or by law enforcement agencies in Mesa, Phoenix, and Scottsdale. BAC results typically are available in five business days or less. This quick analysis and reporting provides prosecutors with the BAC results they need to charge offenders properly.

Outcomes of Arizona's Warrant System

The people interviewed in Arizona concluded that the widespread use of warrants has produced several consequences.

- BAC test refusals decreased substantially. While there are no statewide data, the law enforcement officers, prosecutors, defense attorneys, and judges interviewed all agreed that test refusals dropped dramatically after warrant use became widespread. In Phoenix, an officer with substantial experience with DUI arrests citywide during this period estimated that refusals dropped from about 30 to 40% before warrants were used to 5% or less afterwards.
- BAC evidence is now available for more DUI cases. As noted above, almost every Phoenix DUI case has BAC evidence.
- BAC evidence produces more pleas, fewer trials, and more convictions.
- The impact on pleas, trials, and convictions is especially apparent for drivers with BAC evidence from a blood test resulting from a refusal and a warrant. Defense attorneys noted that "blood never goes to trial." Prosecutors reported that they "haven't lost a blood-test case yet." Juries are quicker to accept BAC evidence from a blood test than from a breath test. Breath test evidence provides more opportunities for defense challenge than blood test evidence.
- Prosecutors have the BAC evidence necessary to charge "extreme DUI." Phoenix prosecutors and defense attorneys reported that extreme DUI may not be charged for drivers with a BAC only slightly above .15 but almost always is charged for drivers with a BAC of .17 or higher and is not pled down to the lesser offense of standard DUI.

Legal challenges. The warrant system has been challenged several times in Arizona courts. None of the challenges have been successful. The Arizona Court of Appeals has ruled that law enforcement phlebotomists are qualified to draw blood under Arizona law, which allows blood to be drawn by "any qualified person."

The broader issue of whether blood may be taken involuntarily for a BAC test rests on *Schmerber v. California* [384 U.S. 757 (1966)], in which the U.S. Supreme Court unanimously ruled that forced blood tests do not violate the Fifth Amendment guarantee against self-incrimination. However, *Schmerber* involved blood drawn by medical personnel in a hospital, and the court's opinion noted that its ruling may not extend to blood drawn in other circumstances. ("We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment - for example, if it were administered by police in the privacy of the stationhouse" [384 U.S. 757 (1966)].) While this language may provide an opportunity to challenge involuntary BAC tests under certain circumstances, the prosecutors and judges interviewed reported that no challenge was underway as of May 2006.

Costs. The primary direct costs of the warrant system are for training law enforcement phlebotomists, purchasing blood test kits, and analyzing blood samples. GOHS pays all training costs: about \$40,000 annually for training about 200 students at \$200 per student. GOHS buys an initial supply of blood test kits for the first phlebotomists in a law enforcement agency to receive

training. After that, agencies pay for their own kits at about \$7 apiece. Agencies also pay for other shared supplies needed by their phlebotomists: perhaps \$1,000 to outfit a squad.

Each laboratory that analyzes blood samples is operated by a law enforcement agency. These laboratories analyze the blood samples as part of their normal operations, at no additional charge to the agency submitting the sample.

The primary indirect costs are for the time required by law enforcement officers and judges. Initial phlebotomist training takes about one week; refresher training takes a few hours. Agencies also give short in-service training to patrol officers in the procedures for submitting warrants (see Appendix K for the lesson plan for Phoenix's two-hour warrant training course). For each BAC test refusal, obtaining a warrant and a blood test adds to the DUI processing time. Judges can issue a warrant in a matter of minutes.

GOHS has encouraged the use of warrants by providing some funding to help establish some of the law enforcement agency laboratories. GOHS also has purchased fax machines for some judges.

Reactions to and Observations Regarding the Warrant System

Law enforcement officers who were interviewed liked warrants because they reduce test refusals, provide BAC test evidence, and allow drivers to be charged with extreme DUI. Phoenix officers reported they would rather have the driver consent to the breath test because it is less invasive and is quicker: Obtaining a warrant and a blood test typically adds between 15 – 90 minutes to DUI processing time. But they are quite willing to obtain a warrant and blood test if the driver continues to refuse.

Phoenix officers reported that drivers usually cooperate with the blood test after a warrant is obtained and explained. If a driver is still uncooperative, officers may gather three or four other officers and then explain to the driver, "Either you cooperate or these guys will hold you down." Officers also may tell the driver, "If you cooperate, you'll go home afterwards; if not, you'll spend the night in jail." These explanations convince almost all drivers to cooperate, so that officers rarely need to use force to obtain a blood sample. Still, defense attorneys and prosecutors have stories of cases in which excessive force may have been used to obtain a blood sample.

Prosecutors who were interviewed strongly supported the system. It provides more BAC evidence which in turn leads to more guilty pleas, more convictions, and more extreme BAC charges. Prosecutors particularly like evidence from blood tests, as blood test cases almost always produce a plea and are easier to prosecute if they go to trial. One prosecutor noted that some juries are not comfortable with law enforcement phlebotomists drawing blood, especially at the roadside when a DUI van is not available, but this discomfort has not led to acquittals.

Defense attorneys who were interviewed have adapted to the system. Phoenix attorneys usually advise drivers to take the breath test. They explain that refusal will lead to a warrant which in turn will produce a blood test, and attorneys would rather have a breath than a blood test because breath tests are easier to attack in court. Attorneys almost never take a blood test case to

trial. Refusal also is almost certain to result in an administrative license suspension. Only in special circumstances would an attorney advise a driver to refuse the test: for example, a high-BAC driver in a situation where a refusal may add a substantial delay before blood could be drawn.

Judges who were interviewed agreed with prosecutors and defense attorneys that warrants produce more BAC tests and that BAC evidence produces more pleas, fewer trials, more convictions, and more extreme BAC law convictions. The judges had no objection to the implied consent provisions that lead to a warrant and a blood draw if a driver refuses a breath test. Many judges cooperate by issuing warrants at all hours of the day and night. One judge has never seen a successful motion to suppress a warrant in two and a half years of DUI cases. Juries seem comfortable with blood draws for refusals as long as an officer has explained clearly to the driver that breath test refusal will lead to a warrant and a blood test.

The media and the public have paid little attention to the warrant system, perhaps because the laws were enacted some time ago and the use of warrants increased gradually over time. The system is now well established and accepted. Nobody who was interviewed remembered any negative news stories regarding warrants.

Some **drinking drivers** know about the system but others do not. Prosecutors who were interviewed reported that most repeat offenders understand that test refusal will lead to a warrant. Defense attorneys reported that some clients were not aware that they would be required to provide a blood sample if they refused a breath test.

GOHS strongly supports the system for the reasons noted above. In addition to funding phlebotomist training and other startup expenses, GOHS promotes the use of warrants at statewide conferences and training for law enforcement, prosecutors, and judges.

Potential Improvements

While the warrant system operates well, some people interviewed recommended that it could be improved by greater standardization and more training.

- Standardize the fax warrant form. Different agencies have different forms, some of which do not have complete information. A standard form statewide would be useful.
- Train law enforcement officers statewide in procedures for obtaining the necessary information for a warrant and processing a warrant.
- Standardize retention requirements for law enforcement phlebotomists. Different agencies have different requirements involving a minimum number of blood draws annually and some form of refresher training. Uniform retention requirements may be useful to further ensure that all law enforcement phlebotomists are fully qualified.
- Maintain a statewide roster of qualified phlebotomists.
- Establish standard procedures for law enforcement phlebotomists, including procedures regarding the use of force to obtain a blood sample. Some agencies have a policy that limits a phlebotomist to two attempts to draw blood; if neither is successful, another phlebotomist must be called. While most drivers cooperate with a blood draw, a few do not, and the possibility of excessive force exists. Clear procedures may help guide officers and assure that force is used only as a last resort. Some blood draws are videotaped.

A videotape provides good, though far from perfect, evidence of how the blood draw was conducted and may be useful in certain circumstances. Videotapes probably should not be expected as standard practice for all blood draws because videotape facilities may not be available, videotapes would add yet another requirement to a complicated and lengthy DUI arrest process, and videotapes may fail to work satisfactorily and could be challenged (for example, if the camera fails to work, the videotape's chain of custody is not documented properly, or the videotape is poor quality or fails to capture critical moments).

Other Issues

Native Americans. Some judges and prosecutors who were interviewed observed that Native Americans are more likely to refuse a BAC test than other drivers. This may suggest cultural or communications issues to be investigated.

DUI arrest processing time. If a warrant is required, in some cases the blood sample may not be drawn until two or three hours after the arrest due to the time needed to offer the breath test, explain the consequences of test refusal, allow the driver to contact an attorney and receive advice back from the attorney, fill out the warrant forms, contact the judge, and receive the signed warrant from the judge. This is not a serious issue but should be kept in mind.

Conclusions

Arizona's warrant system is widely used and fairly standardized. With proper procedures in place, it takes approximately 15 – 90 minutes to fill out the additional information needed for the warrant, call the judge, fax the warrant, and have the warrant signed and faxed back. Law enforcement officers, prosecutors, judges, and defense attorneys interviewed agreed that the warrant system reduces BAC test refusals, provides more BAC test evidence, increases guilty pleas, reduces trials, and provides the evidence needed for an extreme BAC charge. It is very cost-effective. It works very well in metropolitan areas where an Initial Appearance Judge is available to issue warrants all or almost all the time. As one judge noted, "This system certainly could be used in any city of 100,000 or more."

The two key elements of Arizona's warrant system are (1) that it is used extensively statewide, authorized by appropriate laws and using generally similar methods, and (2) that law enforcement phlebotomists make most blood draws.

The people interviewed reported that there is little opposition throughout Arizona to the basic principles underlying warrants: that a driver's license is a privilege, not a right; that drivers agree through implied consent to provide a BAC sample if arrested for DUI; and that a blood sample may be taken, by force if necessary, if drivers refuse the test. The system of law enforcement phlebotomists offers many advantages. The only suggestions for improving the system were to make it consistent, straightforward, and simple throughout Arizona.

Suggestions for States Considering the Use of Warrants for BAC Test Refusals

The law enforcement officers, prosecutors, judges, defense attorneys, and GOHS representatives interviewed in Arizona offered the following suggestions for other States interested in considering the use of warrants.

- Enact laws that authorize warrants, allow law enforcement to choose either a breath test or blood test, and allow more than one test.
- Obtain the support of law enforcement, judges, and prosecutors.
- Assure that laboratory facilities are available to analyze blood samples quickly; provide funding for the laboratory analyses.
- Use law enforcement phlebotomists for blood draws authorized by warrant; provide enough well trained law enforcement phlebotomists where they will be needed throughout the State.
- Convene all key parties – law enforcement, judges, prosecutors, laboratories, and the highway safety office – to plan and implement a cooperative and consistent system; consider a task force to coordinate the system's implementation and operations.
- Use fax warrants with a standard form.
- Design a simple, consistent, and standard system of training, forms, and procedures statewide. Train officers on warrant procedures. Establish clear and consistent policies on when to use warrants, how to locate a judge, how to locate a phlebotomist, how to communicate with drivers, and when and how force can be used.

Use of Blood for All BAC Tests in Some Arizona Jurisdictions

Some Arizona jurisdictions, including Scottsdale, have stopped using breath tests for DUI and now use blood for all BAC tests. Other jurisdictions are considering this practice. A blood test can require no more police time than a breath test if blood test facilities are readily available. Prosecutors also prefer blood test to breath test evidence because blood tests are less open to challenge in court. Defense attorneys typically would rather defend a breath test case than a blood test case because they can attack the breath test machine and procedures. One defense attorney with a large caseload noted that "Juries love blood evidence."

An additional advantage of blood testing is that two blood samples can be drawn. In Arizona, one sample is analyzed by the police laboratory to provide the BAC. The second sample is retained and can be retested by the defense to verify the police laboratory's BAC result. A breath test sample cannot be retained.

Scottsdale's system uses both medical and law enforcement phlebotomists. If the driver consents to the test, the driver is taken to a medical facility where blood is drawn. If the driver refuses, a warrant is obtained and a law enforcement phlebotomist draws the blood sample.

4. Michigan

Overview

Michigan uses warrants extensively throughout the State. Most counties obtain a warrant and a blood sample for almost every driver arrested for OWI (Operating While Intoxicated, Michigan's basic impaired driving offense) who refuses a breath test or blood test to determine BAC (blood alcohol concentration). Some cities use warrants less frequently, especially for first-time offenders.

Michigan's system has two important features:

- 1) It operates at the county and city level, with each county and city setting its own policies and procedures for warrants.
- 2) It uses medical personnel, usually in hospital settings, to draw blood authorized by warrants.

Other key characteristics of Michigan's system include:

- Laws which allow a warrant and blood draw for any alcohol test refusal in any OWI situation and which allow an arresting officer to choose either a breath or blood test;
- Judges and magistrates who encourage warrants and who are on call to issue warrants at all hours of the day and night;
- Prosecutors and district attorneys who have established policies encouraging warrants;
- Law enforcement officers who strongly support the warrant system and use warrants as standard procedure for BAC test refusals; and
- The State Police Crime Laboratory, which analyzes blood samples promptly.

This report is based on discussions with law enforcement officers, prosecutors, defense attorneys, and judges in Eaton and Calhoun counties and the city of Lansing, and with representatives of the Prosecuting Attorneys Association of Michigan (PAAM) and the Office of Highway Safety Planning (OHSP) who have extensive experience with impaired driving enforcement, prosecution, and adjudication statewide. Some observations and conclusions may not apply to all jurisdictions in Michigan. The statements in this report do not necessarily represent the views of all law enforcement officers, prosecutors, defense attorneys, or judges throughout Michigan.

This report is based on discussions with law enforcement officers, prosecutors, defense attorneys, judges, and highway safety officials in Michigan. Some observations and conclusions may not apply to all jurisdictions in Michigan. The statements in this report do not necessarily represent the views of all law enforcement officers, prosecutors, defense attorneys, or judges throughout Michigan.

Laws

Michigan has two impaired driving offenses. The basic offense is OWI (Operating While Intoxicated). A BAC of .08 g/dL is per se evidence of OWI. The lesser offense of OWVI (Operating While Visibly Impaired, or "Impaired"), has no minimum BAC limit. An OWVI conviction is

listed as an impaired driving offense on the driver's record and serves as a prior in the event of a subsequent arrest. First-offense OWI frequently is pled down to OWVI. Michigan has no high-BAC aggravated offense.

Michigan's implied consent law (§257.625c) requires a driver arrested for OWI to submit to a test to determine the BAC. A law enforcement officer may choose to test the driver's breath, blood, or urine, but is limited to a single test. The driver may request that a separate breath, blood, or urine sample be taken, to be available for an independent second test for the driver's own use, but few arrested drivers make this request. If the driver refuses, the officer may seek a warrant for a test.

Drivers who are served a warrant after refusing a test receive the penalty for refusal (one year license suspension for first refusal, compared to 6 months for first offense OWI and 90 days for first offense OWVI, and 6 points on their drivers licenses) and also are subject to any criminal penalties from an OWI or OWVI conviction.

Michigan cities may enact their own ordinances governing first-offense OWI. Most city ordinances provide for warrants. County sheriffs and State highway patrol charge OWIs under State law, even if the arrest is made within a city with a separate first-offense OWI ordinance, so they may use warrants for any arrest. Law enforcement officers in cities with separate ordinances may charge first-offense OWIs under either State or city laws. All second and subsequent offense OWIs must be charged under State law. Third-offense OWI is a felony.

Appendix L contains key sections from Michigan's laws.

How Michigan's Warrant System Began and Spread

Michigan's State law authorizing warrants has been in effect for some time. Kalamazoo and Muskegon counties have used warrants for first offenders for over 10 years. Many other counties have used warrants for repeat offenders for several years. In 2006, warrants were used for almost all repeat offenders statewide.

Many counties recently began using warrants for first-time OWI offenders. As of 2006, most county prosecutors have policies that require law enforcement officers to obtain warrants for all OWI refusals, including first offenders. Some cities also use warrants for all OWI refusals. In a very few rural counties and some cities, judges will not support warrants for first-offense OWIs.

PAAM has encouraged the use of warrants through its interaction with, and training courses for, prosecutors in all counties.

How Michigan's Warrant System Operates

The OWI arrest and the warrant. After a driver has been arrested for OWI, the driver is taken to the police station. The officer reads the implied consent provisions (see Appendix O) and asks the driver for a BAC test, usually a breath test. The officer can choose breath or blood,

and some officers will choose a blood test in cases where this will be faster, for example when a medical facility is nearby but a breath test instrument is some distance away.

If the driver refuses the test, the officer tells the driver that if he or she continues to refuse then the officer will contact a judge and request a warrant for a blood test. There is no standard policy on whether drivers may change their minds and decide to take a breath test after an initial refusal. Generally, once a judge or magistrate has been contacted to obtain a warrant, the driver must provide a blood sample.

Drivers do not have a right to call an attorney before deciding to take or refuse a test, but many officers will allow a driver to make a call as long as this takes no more than a few minutes. Few drivers ask to call an attorney.

If the driver continues to refuse, an officer then fills out a one-page fill-in-the-blank warrant affidavit form (see Appendix M; affidavit forms vary slightly from county to county), phones a magistrate or judge, and faxes the affidavit. All counties have magistrates on call at all times, and a judge is available as backup if a magistrate is not available for any reason. Magistrates can issue warrants only within their own counties. Judges can issue warrants statewide, though judges rarely issue warrants outside their counties. The officer is sworn in by the magistrate and testifies to the facts of the faxed warrant affidavit. The magistrate then signs the warrant (Appendix N) and faxes it back to the officer, who then proceeds to obtain a blood sample.

Some Michigan courts have a policy or standard practice that a prosecutor must review any warrant before it is sent to a magistrate or judge. The fill-in-the-blank standard warrant form has been accepted by prosecutors, magistrates, and judges in some counties so that no further prosecutor review is required for individual warrants. In other counties, the officer phones a prosecutor and faxes the warrant affidavit. The prosecutor reviews and approves the affidavit; the officer then faxes the affidavit to a magistrate or judge. In counties where prosecutors are involved in each warrant, there is a prosecutor on call at all times.

Who draws blood: medical personnel. Blood is drawn by trained medical personnel. Different law enforcement agencies arrange this in different ways.

- In most agencies, an officer will transport the driver to a hospital or other medical facility where blood is drawn by a nurse, physician, or emergency room technician.
- Some larger agencies will have a nurse, physician, medical technician, or contract phlebotomist at the jail during certain times.
- A few agencies will call an ambulance with a trained technician to the jail.

Hospitals and medical facilities do not object to drawing blood, but they also frequently will not give it any priority. The driver takes a turn in the hospital's admissions queue. As a result, officers and drivers may wait two or three hours for a blood draw if the hospital is busy. Some hospitals require drivers to follow the usual hospital admissions procedures, which takes additional time. Some law enforcement agencies have met with hospitals in their jurisdictions to explain the process, agree on procedures, and attempt to expedite blood draws. Individual officers may develop special relationships with medical staff to expedite blood draws.

If a case goes to trial, some hospital and medical staff have been unwilling to testify or have had little or no training or experience in providing effective testimony.

Blood draws use standard kits, supplied by law enforcement. Hospitals that regularly draw blood typically keep a supply of these kits on hand. The officer then takes the blood sample back to the station house, refrigerates and stores it securely, and sends it to a laboratory for testing.

Drivers occasionally resist the blood draws. If so, they are restrained while the blood samples are drawn, using standard hospital equipment for the restraint of unruly patients. Hospital and law enforcement personnel may assist in restraining the driver.

Blood sample analysis and reporting. Most counties and some cities send blood samples to the State Police Crime Laboratory's Toxicology Department for analysis. The laboratory may provide BAC test results within seven days. If a drug analysis is also requested, as is frequently the case, or if the laboratory has a large backlog, then the laboratory may require more time to provide test results.

Outcomes of Michigan's Warrant System

The people interviewed in Michigan concluded that the widespread use of warrants has produced several consequences.

- BAC test refusals are low. Michigan refusal rates have ranged between 10 to 15% for several years and have been gradually decreasing.⁴ The recent expansion of warrants to first-time offenders probably has not changed overall refusal rates much. Some judges and prosecutors noted that "those who used to refuse still refuse, but now we get a warrant, a blood draw, and a BAC."
- BAC evidence is available for most OWI cases. One judge estimated that there was BAC evidence in over 90% of his cases and 80 to 90% of cases in other jurisdictions; one prosecutor estimated about 90%.
- BAC evidence produces more pleas, fewer trials, and more convictions. One prosecutor estimated his county had one OWI trial per year out of 500 to 600 OWI cases (though some may have been pled to avoid a trial); one judge estimated he had three OWI trials in the last six months. One judge noted that trials had increased recently because the OWI penalties were increased when Michigan adopted the .08 per se BAC limit. The BAC evidence itself is not attacked by the defense in a trial, and juries accept it.
- Prosecutors view BAC as strong evidence in an OWI case. Some defense attorneys see BAC evidence as considerably less important than the officer's observations of driving and roadside behavior. BAC evidence is especially useful in OWI courts to help judges assign alcohol treatment if appropriate. Michigan has 17 OWI courts (called "DWI Courts" in other States).
- Prosecutors also prefer blood test to breath test evidence because blood tests are less open to challenge in court. Blood tests also give higher BAC readings because blood tests

⁴ Zwicker, T.J., Hedlund, J., & Northrup, V.S. (2005), "Breath Test Refusals in DWI Enforcement: An Interim Report," HS 809 876, p. 6. Washington, DC: National Highway Traffic Safety Administration.

measure BAC directly while breath tests use a relatively conservative "partition ratio" to convert a breath test measurement into a BAC.

- Some law enforcement officers and prosecutors believe that some repeat offenders may understand that warrants and blood draws will be used for breath test refusals; others believe that most offenders do not know about warrants, do not care, or are sufficiently intoxicated that they cannot analyze rationally the consequences of a refusal.
- The warrant system has received no attention from the media or the public.

Legal challenges. The warrant system is fully accepted. There have been no challenges to the warrant process itself. The faxed warrant system was challenged and upheld. One judge reported perhaps one defense motion a year to suppress BAC evidence obtained by means of a warrant, and these motions have not been successful.

Costs. The main direct costs of the warrant system are for blood draws, blood test kits, and blood sample analyses.

- There appears to be no consistent manner of paying blood draw costs. Some hospitals bill the driver through medical insurance (many of these hospitals require the driver to follow the usual hospital admissions procedures). Some hospitals bill the law enforcement agency for each draw (one agency quoted a cost of \$27 per draw). Law enforcement agencies that have a phlebotomist or other medical personnel at the agency cover the costs of these personnel.
- Law enforcement agencies pay for the blood test kits at about \$7 per kit.
- The State Police Crime Laboratory bills individual agencies for the costs of analyzing blood samples.

Michigan offenders can be ordered to pay certain costs associated with their offenses through a process known as "cost recovery." Perhaps one-third of Michigan's law enforcement agencies bill defendants for the costs of blood draws and analyses, along with other OWI case costs, usually through a fixed fee of \$50 or \$100.

The main indirect costs of the warrant system are for the time required by law enforcement officers and magistrates. Obtaining a warrant and a blood draw adds anywhere from 30 minutes to 3 hours to the time required for an officer to process an OWI case. The greatest uncertainties are the time to transport the driver to and from a hospital or medical facility for the blood draw and the waiting time at the hospital.

Reactions to and Observations Regarding the Warrant System

The judges, prosecutors, and law enforcement officers interviewed all strongly supported the warrant system for BAC test refusals. Their universal reaction upon learning that most States do not use warrants was "Why not?" They believe that it is the right thing to do: BAC evidence is an important part of an OWI case, so if a driver refuses to provide a test, then get a warrant.

Law enforcement officers who were interviewed accepted warrants as part of their job because they provide the BAC test evidence that plays an important part of the OWI case. The only drawback is that a warrant can add substantially to the time required to process an OWI.

Prosecutors who were interviewed strongly supported the system. It provides more BAC evidence which in turn leads to more pleas and more convictions. Prosecutors noted that it is sometimes difficult to get the physician or nurse who drew the blood sample to appear in court. This leads to some cases being pled down, either from OWI to OWVI or to a reduced sentence, rather than risk losing the case at trial if the physician or nurse does not appear.

Defense attorneys have adapted to the system. Attorneys usually advise drivers to take the breath test. They explain that refusal will lead to a warrant which in turn will produce a blood test and a BAC. Refusal also is almost certain to result in an administrative license suspension. One defense attorney believed that the warrant system is not a good use of societal resources because it is an expensive way to obtain information of marginal value to an OWI case. He also saw warrants as a potential way for law enforcement to punish a driver by not explaining carefully that refusal will lead to a warrant and a blood draw, and instead proceeding directly to the warrant without allowing the driver to withdraw the refusal and take the breath test.

Judges who were interviewed agreed with prosecutors and defense attorneys that warrants produce more BAC tests and that BAC tests produce more pleas, fewer trials, and more convictions. Judges noted that the system of warrants and blood draws is now fully established and accepted by the courts, prosecutors, attorneys, and the public. Judges also noted that trials are very expensive, so a reduction in trials produces substantial savings to the court system.

The media and the public have paid little attention to the warrant system, perhaps because the laws were enacted some time ago, the use of warrants increased gradually over time, and the system has not been publicized. The system is now well-established and accepted. Nobody who was interviewed remembered any negative news stories.

Some **drinking drivers** know about the system but others do not. Many repeat offenders probably understand that test refusal will lead to a warrant, but many first-time offenders probably do not.

Potential Improvements

While the warrant system operates well, some people interviewed suggested potential improvements.

- Use warrants for all BAC test refusals, including first-time offenders, in all cities and counties, so the system is uniform statewide. PAAM could continue to advocate for this policy through the Michigan judicial and magistrates associations.
- Consider an automatic blood draw and BAC analysis for all drivers admitted to hospitals after crashes. Currently, hospitals draw blood for medical purposes only for head injury patients, and hospitals may not analyze these blood samples for BAC unless requested. Courts usually can obtain BAC results from hospitals when they are available. Defense attorneys may challenge hospital BAC evidence if there is no apparent medical reason for the blood draw and BAC analysis.
- Consider centralizing blood and breath tests in some geographical areas so that tests are done only at one location where someone always is available to draw a blood sample. Al-

ternatively, find a way to draw blood at the jail or agency headquarters using medical or paramedic phlebotomists. Either method would eliminate long waits for blood draws in hospitals. Blood draws at law enforcement facilities would eliminate the need to transport drivers.

- Consider the use of law enforcement phlebotomists. In addition to the reasons discussed in the Arizona report, this would eliminate one link in the evidence chain – the medical person drawing blood – which in turn eliminates one person who must be prepared to testify in a trial. Medical personnel are “nonstakeholders” in the OWI process (in the words of one judge), so testifying in an OWI case is not high priority for them. Law enforcement officers are major stakeholders and are trained to testify.

Conclusions

Michigan’s warrant system is widely used and fairly standardized, using a simple one-page, fill-in-the-blank warrant form. Its major cost is that it adds to the time that a law enforcement officer spends to process an OWI case when the driver refuses the BAC test. Its major advantage is that it provides BAC evidence in most OWI cases, which leads to more guilty pleas, fewer trials, and more convictions.

Suggestions for States Considering the Use of Warrants for BAC Test Refusals

The law enforcement officers, prosecutors, judges, and OHSP representatives interviewed in Michigan offered the following suggestions for other States interested in considering the use of warrants.

- Michigan’s warrant system is effective, it is the right thing to do (to acquire an important piece of evidence for an OWI case), and its benefits exceed its costs.
- Be sure that State laws authorize warrants and allow law enforcement to choose either a breath or blood test.
- Develop a unified system with cooperation and support from all participants: prosecutors, judges, law enforcement, hospitals and other medical facilities that may be called on for blood draws, laboratories, and alcohol treatment agencies.
- Establish a method to cover the costs of blood draws and blood test analyses.
- Make the system simple: use standard one-page, fill-in-the-blank, faxed affidavits and warrants; have magistrates on call to process warrant requests; obtain prosecutor approval for the affidavit and warrant forms so that prosecutors do not need to approve each individual warrant.
- Provide proper training on warrant procedures to law enforcement officers.
- Use the same system and procedures statewide.

5. Oregon

Overview

Oregon recently began to use warrants for nonconsensual chemical testing of drivers arrested for DUII (driving under the influence of intoxicants) who refuse breath tests. The use of warrants has not been widely adopted and there appears to be resistance in the larger urban areas. Key characteristics of Oregon's system include:

- There is no specific law that allows for forced blood draws;
- Existing DUII law has been interpreted to allow police to obtain a warrant to require a suspect who refuse a breath test to submit to a blood test;
- The suspect must be transported to a hospital to have blood drawn by qualified medical personnel; and
- Warrants are used in only a few counties.

This report is based on discussions with law enforcement officers, prosecutors, defense attorneys, judges, and highway safety officials in Oregon. Some observations and conclusions may not apply to all jurisdictions in Oregon. The statements in this report do not necessarily represent the views of all law enforcement officers, prosecutors, defense attorneys, or judges throughout Oregon.

Laws

Oregon's implied consent law (ORS 813.100) requires a driver arrested for DUII to submit to a chemical test of breath or blood if being treated in a health care facility, for the purpose of determining the alcohol content if the person was arrested for DUII. Before the test is given, the driver must be informed of the consequences and rights.

In addition, Oregon law requires a driver suspected of DUII to submit to field sobriety tests (ORS 813.135). Before the tests are administered, the suspect must be informed of the consequences of refusing or failing the tests.

In cases of refusal, the procedure to draw blood on a warrant is not statutory but is based on an interpretation of the existing DUII law. ORS 813.320 states that the implied consent law does not limit the introduction of competent, relevant evidence of the amount of alcohol in the blood of a defendant if the evidence results from a test of blood taken while the defendant was hospitalized or receiving medical care or if the evidence is obtained pursuant to a search warrant.

The penalty for test refusal is a \$500 fine and a 12-month license suspension. Upon refusal, the officer issues a temporary license certificate that is valid for 30 days, during which time the driver may request a hearing.

The basic license suspension for DUII conviction is 90 days for a first offense. Longer suspensions are imposed for repeat offenses. First offenders are eligible for diversion.

Appendix P contains key sections from Oregon's laws.

How Oregon's Warrant System Began and Spread

The opportunity to seek a warrant to obtain evidence from a blood alcohol test is provided in ORS 813.320 (2)(b). Although this statute does not specifically state that a warrant can be obtained to force DUII suspects to provide a blood sample, it clearly indicates that evidence obtained from a blood sample is not precluded by the implied consent law if the evidence was obtained pursuant to a search warrant. Only in the past few years have police begun to seek warrants to obtain blood samples in DUII cases in which the drivers have refused to provide breath samples.

Other instances in which blood may be drawn without the consent of the suspect are when:

- There is probable cause to believe the person was driving while under the influence of intoxicants and the person is unconscious or otherwise incapable of expressly consenting to the test or tests required (ORS 813.140); and
- Evidence of the amount of alcohol in the blood is obtained from the results of a test of blood taken from the suspect while the suspect was hospitalized or otherwise receiving medical care (ORS 813.320).

Only a few counties actively participate in a program to obtain warrants for forced blood draws from DUII offenders. Efforts by individual prosecutors and some police departments to involve more counties continue, particularly counties that include large urban areas.

The system of warrants requires the active support of prosecutors and judges. In counties where the prosecutors and judges support the program, warrants are obtained regularly for refusal cases. In other counties, prosecutors or judges may disagree with the need for blood warrants, do not wish to be bothered late at night for DUII cases, or refuse to participate in a process of telephonic warrants. This severely restricts the opportunity to expand the program.

How Oregon's Warrant System Operates

The DUII arrest and the warrant. Upon arrest for suspicion of DUII, the offender is taken to the station and the law enforcement officer requests the driver to provide a sample of breath for analysis of alcohol content. The suspect is advised of the consequences and rights associated with refusal. If the driver refuses the breath test, the officer uses a template to complete the warrant and either reads it over the phone or sends it by fax to the on-call prosecutor who must approve the warrant. The on-call judge is called and the call must be recorded. The warrant is printed and signed and either taken to the judge or sent by fax.

Once the warrant is obtained, the suspect must be taken to the hospital to have blood drawn. If necessary, the suspect is restrained. A qualified medical practitioner must draw the blood. Some medical staff may be reluctant to draw blood without the person's consent or for any reason that is not strictly for medical purposes; therefore, it is necessary to have a copy of the search warrant in hand. At times, it is helpful to have the warrant state "This is a court order" to help medical personnel understand the implications of a search warrant. The sample is then taken to the State lab for analysis.

Who draws blood: medical personnel. Blood samples must be drawn by qualified medical practitioners: a doctor, nurse, or phlebotomist in a hospital or an EMT. No law enforcement officers in Oregon are trained as phlebotomists.

Blood sample analysis and reporting. Oregon reports that approximately 200 blood tests are performed each year, as compared to 50,000 to 60,000 breath tests. Blood samples are typically stored until there are a sufficient number to test. All DUII blood samples in Oregon are analyzed at State police laboratories. BAC results are returned within 30 days. A law enforcement officer who works closely with the State toxicology laboratories and the breath test program indicated that the average BAC from blood tests was approximately .20, whereas the average from breath tests was about .15.

Outcomes of Oregon's Warrant System

The people interviewed in Oregon generally agreed that the use of warrants to obtain blood samples from DUII offenders who refuse to provide a breath sample can be the difference in whether or not a case goes to trial. Blood alcohol evidence is viewed as strong and most defendants will not try to defeat it. The process is not used widely enough to know whether it has had any impact on the number of refusals. In general, though, first-time offenders who are eligible for diversion are unlikely to refuse. Repeat offenders who have been through the process on at least one previous occasion are most likely to refuse the breath test. Blood alcohol evidence from these offenders helps to increase the likelihood of conviction.

Legal challenges. Oregon law provides the opportunity to obtain a warrant for forced blood draws in the case of an implied consent refusal and this right has been upheld in two cases. In *State v. Jaehnig* the court determined that a mere statutory violation of rights will not cause evidence to be suppressed. Therefore, statutory violation of implied consent will not cause blood draw results to be suppressed. *State v. Shantie* went one step further and determined that ORS 813.320 authorizes a blood draw even when the only offense being investigated is DUII.

Costs. Alcohol tests are performed by State laboratories, which analyze the blood samples as part of their normal operations, at an estimated cost of \$50 per test.

The main indirect costs are for the time required by law enforcement officers and judges to complete the warrant process. Time expenditures, primarily the time involved in obtaining the warrant and transporting the suspect to the hospital to have blood drawn, are seen as the major drawbacks to the warrant procedure. The people interviewed in Oregon stated that this procedure can increase the time required to process a DUII offender from an average of two or three hours to as much as five or six hours. This is not an insignificant investment of time and some supervisors may object to taking an officer off the road for such an extended period of time.

Reactions to and Observations Regarding the Warrant System

Law enforcement officers interviewed in Oregon liked the search warrant process because they believe it reduces test refusals and provides BAC test evidence, often critical in the successful prosecution of DUII cases. Although the process of obtaining a warrant and obtaining a blood

sample can add significantly to the time required to process a DUII offender, officers recognized the importance of BAC evidence in a DUII case and most are willing to go to the effort of obtaining a warrant to help ensure a conviction.

The **judges** interviewed believe that the warrant system appears to have more support in some areas of the State than others. The people interviewed in Oregon reported that some judges do not feel DUII is a sufficiently serious crime to invoke forced blood draws.

Prosecutors who were interviewed report that blood test evidence is always welcome by prosecutors in a DUII case. It is viewed as strong, compelling evidence that can produce a plea and avoid a lengthy trial.

Potential Improvements

While the warrant system operates well where it is used, some people interviewed recommended that it could be improved by greater standardization and more widespread acceptance.

- Expand the program to include more counties, particularly those that include large urban areas.
- Train law enforcement officers in obtaining the necessary information required for an affidavit and a warrant in a DUII case.
- Implement a law enforcement phlebotomist program to allow trained and certified police officers to draw blood.

Other Issues

The time required to contact a judge, complete the forms, swear the information, obtain a warrant, transfer the suspect to the hospital, and obtain a blood sample is not trivial and can add significantly to what is already a lengthy procedure for processing a DUII offender.

The support of prosecutors and judges is critical to the successful use of warrants.

Conclusions

The system for obtaining warrants for blood samples from DUII offenders who refuse to provide breath samples in Oregon appears to work efficiently and effectively where it is used.

The people interviewed agreed that the warrant system reduces BAC test refusals, provides more BAC test evidence, increases guilty pleas, reduces trials, and provides the evidence needed for a DUII conviction. Its major drawback is the amount of time required to obtain a warrant and have blood drawn.

6. Utah

Overview

Utah uses warrants for nonconsensual chemical testing extensively statewide for drivers arrested for DUI (driving under the influence of alcohol or drugs) who refuse a breath test. The program appears to be more widely employed by the Utah Highway Patrol but it is beginning to spread throughout municipal police departments as well. Key characteristics of Utah's system include:

- The authority to draw blood in cases of breath test refusal is not statutory but is based on case law;
- A number of law enforcement officers have been trained and certified as phlebotomists and perform authorized blood draws;
- Civilian phlebotomists can be used or the suspect can be transported to a hospital;
- Prosecutors and district attorneys have established standard forms for affidavits and warrants to facilitate blood draws; and
- The Department of Public Safety has established policies and procedures concerning nonconsensual chemical testing.

This report is based on discussions with law enforcement officers, prosecutors, defense attorneys, judges, and highway safety officials in the greater Salt Lake City area. Some observations and conclusions may not apply to all jurisdictions in Utah. The statements in this report do not necessarily represent the views of all law enforcement officers, prosecutors, defense attorneys, or judges throughout Utah.

Laws

Utah's implied consent law (UCA 41-6a-520) requires a driver arrested for DUI to submit to a chemical test of breath, blood, urine, or oral fluids for the purpose of determining whether the person was operating, or in actual physical control of, a motor vehicle while having a BAC in excess of .08, while under the influence of alcohol, a drug, or combination of alcohol and any drug, or while having any measurable controlled substance or metabolite of a controlled substance in the body. A law enforcement officer determines which and how many tests may be administered. Refusal to submit to the first or any subsequent requested tests constitutes a refusal. The officer requesting a test is required to warn the suspect that refusal to submit to a test may result in revocation of the person's license and a five- or ten-year prohibition from driving with any measurable amount of alcohol in the person's system.

In cases of refusal, the procedure to draw blood on a warrant is not statutory but is based on case law whereby a police officer swears an affidavit before a justice and can be granted a warrant to obtain a blood sample. The procedure is similar to that in any other situation where a warrant is requested to collect evidence of a crime. A lower appeals court acknowledged the process in an opinion overturning a warrantless blood draw (*State v. Rodriguez* 93 P.3d 854, 2004 UT app 198; www.utcourts.gov/opinions/appopin/rodrig061004.htm).

The administrative penalty for test refusal is a mandatory 18-month license suspension. Upon refusal, the officer gives notice of the Driver License Division's intention to revoke the person's license, takes possession of the license, and issues a temporary license certificate that is valid for 29 days during which time the driver may request a hearing before the Driver License Division.

The basic license suspension for a DUI conviction is 90 days for a first offense and one year for a second or subsequent offense. Other sanctions may include 48 hours incarceration or community service or home confinement; alcohol screening, assessment and rehabilitation; and a fine of \$700. Offenders with a BAC in excess of .16 are subject to more severe sanctions and restrictions including treatment, home confinement, supervised probation, and participation in an ignition interlock program.

Appendix Q contains key sections from Utah's laws.

How Utah's Warrant System Began and Spread

The opportunity to seek a warrant to obtain evidence of a crime has always been available. Until about three years ago, warrants to obtain blood samples were rarely sought for DUI cases except where serious injury or death was involved. It was considered an expensive and time-consuming procedure.

Several years ago, following a serious collision, law enforcement officers ordered a blood sample without a warrant from the driver responsible for a serious crash to obtain evidence of alcohol involvement, believing the exigent nature of the circumstances did not allow sufficient time to obtain a warrant. Although the subsequent appeals court decision overturned the driver's conviction because the blood sample was obtained without a warrant, the ruling acknowledged that an officer could obtain a warrant to force a suspect to provide a blood sample for analysis of alcohol or drug content. This landmark case (*State v. Rodriguez*) is still under appeal but the major issue as of 2006 involved defining the situations or circumstances which qualify as exigent and thereby allow the officer to obtain a blood sample without a warrant. The decision is not expected to impact the ability of an officer to seek a warrant for a nonconsensual blood draw in DUI cases.

Taking a DUI suspect to a hospital for a blood test was found to be a time-consuming process. State law (Utah Health Code 26-1-30) allows qualified people to draw blood from DUI suspects. Therefore, the Highway Patrol contracted with civilian phlebotomists to draw blood from suspects on an as-needed basis. This was deemed to be an expensive process. Based on the reported success in Arizona, Utah began training Highway Patrol troopers as phlebotomists to conduct their own blood draws.

As of June 2006 there were 53 active trooper phlebotomists in Utah and there were plans to train more. Civilian phlebotomists were still used when necessary. Warrants were used statewide but may not be as common in some areas as in others. The law enforcement phlebotomist program was limited to the Utah Highway Patrol and it is not known whether many municipal police departments will adopt it.

The ability to obtain a blood sample from drivers who refuse to provide a breath sample is embraced with considerable enthusiasm among the officers interviewed. They view it simply as a means to obtain evidence of a crime that will help ensure the offender is convicted and punished for the offense.

How Utah's Warrant System Operates

The DUI arrest and the warrant. Upon arrest for suspicion of DUI, the officer requests the driver to provide a sample of breath (or blood, urine, or oral fluids) for analysis. The suspect is read word-for-word the formal arrest and refusal admonishment on the DUI citation that states that failing to provide the requested samples may result in revocation of the person's driver's license (18 months), a five- or ten-year prohibition from driving with any measurable amount of alcohol in the driver's system, and the forcible withdrawal of a blood sample. If the driver continues to refuse, the officer contacts the on-call prosecutor who takes the information to a judge to obtain a warrant for a blood test. Alternatively, depending on the jurisdiction, the officer will contact the on-call judge directly to obtain a warrant. The call is recorded (in-vehicle video may be used) and the paperwork is completed later. Some counties have established standard affidavit and warrant forms (fill-in-the-blanks) that simplify the procedure for the officer and the judge (see Appendices R and S for samples from Salt Lake County).

Many affidavits and warrants can be faxed. The officer fills out the required forms, phones the judge, is sworn in, provides details to the judge, and faxes the warrant form to the judge. The judge then reviews and signs the warrant and faxes it back to the officer, who then can proceed to obtain a blood sample. If fax facilities are not available, warrants can be obtained by phone. There is a proposal to provide judges with personal digital assistants (PDAs) to allow warrants to be completed via wireless communication.

Once a warrant is obtained, the arresting officer must obtain approval for the procedure from a supervisor. The supervisor contacts a qualified phlebotomist to draw the sample. If readily available, the supervisor is present during the procedure to ensure that it is done according to policy guidelines and that no more force or restraint than is reasonably necessary is used. Wherever possible, blood is drawn by a trooper phlebotomist. Otherwise civilian phlebotomists on contract can be called or the suspect can be taken to a hospital.

The blood sample is stored appropriately and sent to the State laboratory (Department of Public Safety) for analysis. The warrant form is returned to the issuing judge or court within three to five days.

Who draws blood: law enforcement phlebotomists. When Utah began using warrants for BAC test refusals, blood was drawn by a medical phlebotomist, either a nurse or technician at a hospital or other medical facility, or a contract phlebotomist at a police agency. In some instances it was difficult to access a medical phlebotomist in a timely manner because they were busy, hard to contact, or located far away from the arresting officer and driver.

Following the lead of Arizona, the Utah Highway Patrol began a phlebotomist training program for law enforcement officers. Training is provided by the Utah School of Phlebotomy using certi-

fied instructors and a standard curriculum. The course is taught two days per week for two weeks at a cost of \$250 per student. In conjunction with the course, officers are instructed in evidence collection and handling procedures. Initially, approval was obtained to train 60 officers and 53 were still active in the program as of June 2006. Central records are kept of the officers certified and each officer maintains a log in which blood draws are recorded.

Troopers who have completed this training are known as "trooper phlebotomists" and are recognized as "qualified" to draw blood under Utah law (Utah Health Code 26-1-30(2)(s)). Current phlebotomists require four hours of in-service training every two years to retain their qualification. Interviewees pointed out that there is always the risk of medical complications, such as uncontrolled bleeding, that can create problems when blood is drawn away from a medical facility. The authorities who were interviewed also noted that if law enforcement officers forcibly draw blood from DUI suspects, the public may perceive the officers as overstepping their authority.

Contract civilian phlebotomists are still used when a trooper phlebotomist is not available. Blood samples can also be obtained by taking the suspect to a hospital.

The law enforcement officers, prosecutors, judges, and highway safety officials interviewed in Utah concluded that law enforcement phlebotomists offer several advantages over medical phlebotomists.

- It is less expensive to train a law enforcement officer as a phlebotomist than to pay a civilian phlebotomist for blood draws: a one-time training cost of \$250 compared to a cost of about \$40 for each blood draw;
- If a trooper phlebotomist is on duty, it takes considerably less time to obtain a blood draw than to call a civilian phlebotomist or transport the suspect to a hospital, especially in rural areas;
- Blood draws performed at the station can be witnessed by other officers who may also be required to provide assistance;
- Trooper phlebotomists can also be used to draw blood when required as part of the Drug Evaluation and Classification (DEC) procedure; and
- Defense attorneys often advise clients to provide a breath sample because the period of license suspension for refusal is considerably longer than that for a DUI conviction.

Blood sample analysis and reporting. In 2005, trooper phlebotomists in Utah performed 423 blood draws (no data were available for four officers). Four officers reported performing at least 25 blood draws each. All DUI blood samples in Utah are analyzed at the State Toxicology Laboratory. BAC results typically are available in 5 to 10 business days.

Outcomes of Utah's Warrant System

The law enforcement officers, prosecutors, judges, and highway safety officials interviewed in Utah concluded that the use of warrants has produced several consequences.

- BAC test refusals decreased substantially, from 51.8% in 1996 to 17.3% in 2001.⁵
- BAC evidence is now available for more DUI cases that might otherwise not be prosecuted successfully.
- BAC evidence produces more pleas, fewer trials, and more convictions.

Legal challenges. The warrant system appears to operate without serious problems in Utah. Qualified law enforcement phlebotomists are authorized to draw blood under Utah law, which allows blood to be drawn by “any qualified person.”

As in other States, the *Schmerber* decision (*Schmerber v. California* 384 U.S. 757 [1966]) is cited in support of using involuntary blood draws. In this case, the U.S. Supreme Court unanimously ruled that forced blood draws do not violate the Fifth Amendment guarantee against self-incrimination. As indicated previously, in Utah the *Rodriguez* case is cited as providing support for the use of warrants to obtain forced blood draws from DUI offenders.

Law enforcement officers indicated that because blood alcohol evidence dissipates with time, exigent circumstances (primarily time constraints in cases of serious collisions) allow forced blood draws in the absence of a warrant. The appeals court decision in the *Rodriguez* case indicated that an effort should be made to obtain a warrant before the suspect is required to submit to a nonconsensual blood test. A final decision on the *Rodriguez* case may help to define what constitutes exigent circumstances in DUI cases. In the meantime, prosecutors urge law enforcement officers to seek a warrant prior to every forced blood draw.

Costs. In fiscal 2004, DPS spent approximately \$17,000 on blood draws in hospitals or by contract phlebotomists in Salt Lake, Utah, Davis, Weber and Toole Counties. Salt Lake County alone spent approximately \$12,000. It costs \$250 to train each officer as a trooper phlebotomist; 50 officers could be trained for less than is currently spent on blood draws. Blood draw kits are supplied by the toxicology lab. Other supplies – gloves, bandages, tourniquet, cotton sponges – can be supplied at about \$1 per kit. “Sharps” containers (for used syringes) are \$3 each.

Alcohol tests are performed by State laboratories. These laboratories analyze the blood samples as part of their normal operations, at no additional charge to the agency submitting the sample. The actual cost per test is not known.

The main indirect costs are for the time required by law enforcement officers and judges. Initial phlebotomist training takes four days; refresher training takes four hours. Agencies also give short in-service training to patrol officers in the procedures for completing warrants.

⁵ Zwicker, T.J., Hedlund, J., & Northrup, V.S. (2005), “Breath Test Refusals in DWI Enforcement: An Interim Report,” HS 809 876, p. 6. Washington, DC: National Highway Traffic Safety Administration.

Reactions to and Observations Regarding the Warrant System

Law enforcement officers who were interviewed liked warrants because they believe that they reduce test refusals and provide more BAC test evidence, which in turn allows drivers with BACs over .16 to be issued more-severe sanctions. Although the process of obtaining a warrant and obtaining a blood sample can add significantly to the time required to process a DUI offender, the trooper phlebotomist program can reduce that time considerably. Officers recognized the importance of BAC evidence in a DUI case. The officers interviewed believe that they, along with their fellow officers who deal with drinking drivers on a regular basis, are willing to go to the effort of obtaining a warrant to help ensure a conviction in those situations where the driver refuses to provide a sample voluntarily.

There is some concern that warning the suspect of the consequences of refusing to provide a breath sample might be perceived as a way to coerce the suspect into submitting to the breath test. While some see it as fair to provide suspects the opportunity to change their mind, others believe that once suspects have refused to provide a sample they are in violation of implied consent and the officer should proceed accordingly without an explicit warning.

Blood test evidence is always welcome by prosecutors in a DUI case. It is viewed as strong, compelling evidence that can produce a plea and avoid a lengthy trial.

The warrant system appears to have more support in some areas of the State than others. For whatever reasons, there remains some opposition to forced blood draws.

Potential Improvements

While the warrant system operates well, some people interviewed recommended that it could be improved by greater standardization and more widespread acceptance.

- Standardize the affidavit and warrant forms across jurisdictions. Different counties use different forms; some do not have standard forms. The greater the consistency in the information required, the easier it is for officers to complete the forms. Standard forms statewide would be useful.
- Train law enforcement officers in obtaining the necessary information required for an affidavit and for a warrant in a DUI case.
- Expand the law enforcement phlebotomist program to other police departments. Currently, only the Highway Patrol has an officer phlebotomist program. Municipal and local police agencies could benefit from this type of program as well.

Other Issues

The time required to contact a judge, complete the forms, swear the information, obtain a warrant, contact a phlebotomist, and obtain a blood sample is substantial and can add significantly to what is already a lengthy process of processing a DUI offender.

Some people interviewed suggested that there might be some general deterrent value in informing the general public about forced blood draws. On the other hand, the wrong message – or an inappropriate slant on the message – might be used to tarnish the image of law enforcement officers.

The support of prosecutors and judges is critical to the successful use of warrants.

Conclusions

Utah's system for obtaining warrants for blood samples from DUI offenders who refuse to provide a breath sample works efficiently and effectively. Written policies and procedures have been produced to ensure a consistent and standardized process in some counties.

The people interviewed agreed that Utah's warrant system reduces BAC test refusals, provides more BAC test evidence, increases guilty pleas, reduces trials, and provides the evidence needed for a DUI conviction. The trooper phlebotomist program is used widely by the Highway Patrol but has not spread to other police agencies in the State. It reduces the need to transport suspects to a hospital or to call in a civilian phlebotomist to draw blood. It is cost-effective.

There is little opposition to the basic principle underlying warrants – the police view it as a process necessary to obtain evidence of a crime. It also gives teeth to the implied consent law.

7. California, Nevada, and North Carolina

California, Nevada, and North Carolina all allow blood draws for breath test refusals without a warrant. The researchers conducted phone interviews with knowledgeable officials in California and Nevada. North Carolina's law came into effect on December 1, 2006, as this report was being completed.

California and Nevada both allow a blood sample to be obtained without a warrant from a driver who has refused an officer's request for a breath, blood, or urine sample. As a result, BAC evidence from a breath or blood test is available for almost every driver arrested for DUI in California and Nevada. A North Carolina law similar to Nevada's became effective on December 1, 2006. This section summarizes the California and Nevada systems and the recently enacted North Carolina law.

California

California's implied consent law requires drivers arrested for DUI to provide a blood or breath sample (California Vehicle Code 23612). If the driver refuses, law enforcement officers may obtain a blood sample, by force if necessary. Their authority rests on California case law beginning with the U.S. Supreme Court decision in *Schmerber v. California* [384 U.S. 757 (1966)]. The blood sample must be drawn in a medically approved manner at a hospital or other suitable facility. A warrant is used only in rare circumstances: for example, for some seriously injured drivers in hospitals who cannot respond to a law enforcement officer's request for a breath or blood sample.

California law enforcement officers routinely use this process to obtain blood samples from drivers who refuse to provide a breath or blood sample voluntarily. As a result, California has few breath test refusals (the reported refusal rate in 2001 was 5.3%⁶) and has BAC evidence for almost all drivers arrested for DUI.

Nevada

Nevada's implied consent law contains the usual requirement that a driver must provide an evidentiary breath, blood, or urine sample when an officer has reasonable grounds to suspect that the driver was under the influence of alcohol or drugs. Nevada law also provides that breath test BAC evidence can be used only if two consecutive breath tests produce consistent BAC values. If they do not, the driver must provide a third breath test; if this test's BAC is inconsistent with both the previous BAC values, the driver must provide a blood sample. If the driver refuses any breath or blood sample request, Nevada law authorizes law enforcement officers to use force if necessary to obtain a blood sample:

⁶ Zwicker, T.J., Hedlund, J., & Northrup, V.S. (2005), "Breath Test Refusals in DWI Enforcement: An Interim Report," HS 809 876, p. 6. Washington, DC: National Highway Traffic Safety Administration.

NRS 484.383(7). If a person to be tested fails to submit to a required test as directed by a police officer pursuant to this section and the officer has reasonable grounds to believe that the person to be tested was: (a) Driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance; or (b) Engaging in any other conduct prohibited by NRS 484.379, 484.3795 or 484.37955, the officer may direct that reasonable force be used to the extent necessary to obtain samples of blood from the person to be tested.

This law clearly allows a blood sample to be drawn without a warrant. The blood sample may be drawn by any qualified person. In practice, most blood samples are drawn by registered nurses, who are under contract to law enforcement agencies and who are called to the police station as needed.

This law has been in effect since 1985. As a result, BAC evidence from a breath or blood test is available for almost every driver arrested for DUI in Nevada. The exceptions are drivers arrested in very rural areas, more than two hours away from the nearest law enforcement agency and evidential breath test machine.

North Carolina

In the 2006 legislative session, North Carolina enacted a law similar to Nevada's.

Bill 1048, Part IX, Section 16, revising G.S. 20-139.1, (c). Notwithstanding any other provision of law, when a blood or urine test is specified as the type of chemical analysis by a law enforcement officer, a physician, registered nurse, emergency medical technician, or other qualified person shall withdraw the blood sample and obtain the urine sample, and no further authorization or approval is required

(www.ncleg.net/Sessions/2005/Bills/House/HTML/H1048v6.html).

The law became effective on December 1, 2006.

8. Summary and Conclusions

Legal Basis of Warrants

All States have implied consent laws with administrative sanctions for drivers who refuse a breath test. Arizona and Michigan have laws that specifically authorize law enforcement officers to seek warrants to obtain blood samples from drivers arrested for DUI who refuses to provide breath samples, and Oregon's law has been interpreted to provide the same authorization. Utah derives the authority from case law, whereby obtaining a warrant is merely viewed as a means of obtaining evidence of a crime. Nevada and North Carolina laws allow a blood sample to be obtained without a warrant from a driver who refuses a breath test. California also allows a blood sample to be obtained without a warrant, based on *Schmerber v. California* (384 U.S. 757[1966]).

Case study State officials often cited the U.S. Supreme Court decision in *Schmerber v. California* as providing support for warrants. In this landmark case, the court ruled that forced blood draws did not violate the Fifth Amendment guarantee against self-incrimination.

Different aspects of the warrant system have been challenged in the courts of each case study State. None of the challenges has been upheld.

History and Current Use of Warrants

NHTSA is aware of six States that used warrants extensively for BAC test refusals in at least in one jurisdiction in 2006. Four of these States, Arizona, Michigan, Oregon, and Utah, were chosen for in-depth examination in this study.

In the four case study States, the opportunity to obtain a warrant for a blood sample had been available for many years, but the procedure was rarely used until relatively recently.

- In Arizona, jurisdictions including Phoenix, Peoria, and Scottsdale began to use warrants for some more serious DUI cases in the mid-1990s. At about the same time, the Arizona State police began training law enforcement officers as phlebotomists. As of 2006, some Arizona jurisdictions use warrants for all BAC test refusals and most jurisdictions use them for some refusals.
- In Michigan, some counties have used warrants for first offenders for over 10 years and many other counties have used them for repeat offenders for several years. As of 2006, most county prosecutors have policies that require law enforcement officers to obtain warrants for all BAC test refusals, including first offenders.
- In Oregon, law enforcement officers in a few counties recently began to seek warrants for some BAC test refusals.
- In Utah, until about three years ago warrants were rarely sought except in cases involving serious injury or death. Based on the experience of neighboring Arizona, Utah began to train Highway Patrol officers as phlebotomists. As of 2006, warrants are used statewide, more commonly in some areas than in others, with Highway Patrol phlebotomists providing many of the blood draws.

The Warrant Process

The process for obtaining a blood sample from a DUI suspect is similar in all four case study States. The driver is arrested for DUI and is asked for a breath sample. The driver is informed of the State's implied consent provisions and penalties. If the driver refuses to provide a breath sample, the officer proceeds to request a warrant for a blood sample. Jurisdictions differ as to when, and if, drivers may change their minds and agree to provide breath samples. Generally, once the officer has contacted a magistrate, judge, or prosecutor regarding a warrant, the driver's refusal is final, the administrative sanctions for an implied consent refusal are invoked, and the driver must submit to a blood test if a warrant is granted.

To obtain a warrant, the arresting officer usually completes standard affidavit and warrant forms. In some jurisdictions, the officer first contacts an on-call prosecutor; in others, the officer immediately contacts a judge or magistrate on duty. The forms can be faxed to the judge or magistrate for signature or the warrant can be sworn by telephone (with the conversation usually recorded) and the paperwork can be completed the following day.

Once the warrant is granted, the driver is required to provide a blood sample. In Michigan and Oregon, the driver is taken to a facility where a qualified medical practitioner (physician, nurse, EMT, or phlebotomist) draws a blood sample or a qualified person is called to the police station to draw the sample. In Arizona and Utah, a number of law enforcement officers have been trained and certified as phlebotomists and are authorized to draw blood samples. They typically draw the blood sample at the police station, eliminating the need to transport the driver to a medical facility. If a law enforcement phlebotomist is not available, blood can be drawn by medical personnel as in Michigan and Oregon. In all States the driver will be charged with and face the penalties for a BAC test refusal in addition to potential charges and penalties for DUI.

Advantages of Warrants

Judges and prosecutors interviewed in all four case study States strongly agreed that the driver's BAC is a valuable piece of evidence in court and can make the difference between a guilty plea and a trial. BAC evidence is critical in the prosecution of extreme DUI cases and also is important in cases involving repeat offenders.

Judges and prosecutors interviewed in case study States agreed that the use of warrants has reduced breath test refusals and increased the proportion of DUI cases with BAC evidence in their jurisdictions. This in turn has produced more guilty pleas, fewer trials, and more convictions. In addition, blood alcohol test evidence is often considered the "gold standard" in DUI cases. While breath test BAC evidence is often challenged by defense counsel, blood test evidence is rarely questioned.

Law enforcement officers interviewed in case study States generally supported the use of warrants. They are willing to take the additional time that the warrant process requires in order to obtain BAC evidence. Prosecutors strongly supported the use of warrants. Many judges also strongly supported warrants, to the extent of volunteering to answer their telephone in the middle of the night to issue warrants.

Disadvantages of Warrants

The major disadvantage of the warrant system reported by the people interviewed is the additional time required to obtain the warrant and the blood sample. It can take an officer an extra 90 to 120 minutes or more to complete the warrant forms, transmit the information to a judge for signature, transport the suspect to a medical facility or call a phlebotomist to the station, and obtain the blood sample. Additional time may be required to obtain or complete original documents the following day. The use of law enforcement phlebotomists can eliminate both the need to transport the driver to and from a medical facility and the time spent waiting for the blood sample to be drawn.

People interviewed reported that some judges remain uncomfortable with warrants obtained by telephone and fax. Others are not satisfied that cases of "simple DUI" justify the use of such forcible and invasive procedures to obtain BAC evidence. These obstacles must be addressed before a system for obtaining warrants can be universally and equally applied in a jurisdiction.

People interviewed noted that the use of law enforcement phlebotomists may raise a risk of unexpected medical complications from a blood draw in a police station, with no physician or other medical staff present. No such instances have been reported in Arizona or Utah, the two States in which law enforcement phlebotomists are used. It is imperative that officer phlebotomists receive complete and thorough training and engage in ongoing certification courses to ensure they maintain their qualifications and are able to draw blood in a safe and professional manner.

People interviewed suggested that the public may believe that law enforcement phlebotomists provide an opportunity for police harassment. Again, procedures for law enforcement phlebotomists should be clearly defined and followed. No questions of harassment have been reported in Arizona or Utah.

Conclusions

Each case study State uses warrants for some drivers arrested for DUI who refuse breath tests. The main differences in warrant procedures across the four States are:

- How warrants are authorized: by statute (Arizona, Michigan), by interpretation of statute (Oregon), or through case law (Utah).
- How the system is structured: with common procedures statewide (Arizona and Utah) or with county-level procedures (Michigan and Oregon).
- Where and how frequently warrants are used:
 - statewide, quite extensively, for all refusals in major jurisdictions (Arizona);
 - in most counties, quite extensively, for all refusals in many counties (Michigan);
 - statewide, primarily through the Highway Patrol (Utah);
 - in a few counties (Oregon).
- Who draws blood: medical personnel (Michigan and Oregon) or law enforcement phlebotomists (Arizona and Utah).

Each State's system is now well accepted in the jurisdictions in which it operates. In each State, the people interviewed agreed that warrants have reduced breath test refusals and produced BAC evidence in more DUI cases. This in turn has produced more pleas, fewer trials, and more convictions.

The major reported disadvantage of a warrant system is its costs: the additional time required for a law enforcement officer to obtain a warrant and collect a blood sample; the cost of drawing the blood sample, measured either by the charge for a sample drawn at a medical facility or by the cost of training law enforcement phlebotomists; and the cost of analyzing the blood sample. If trained law enforcement phlebotomists are used to draw blood samples, then additional law enforcement time and out-of-pocket costs are lower, but still are greater than the costs of taking no further action when a driver refuses to provide a BAC sample. Many of the people interviewed regarded these costs as necessary and appropriate for acquiring critical evidence for the criminal DUI charge. Others pointed out that DUI trials are very expensive. If a warrant system increases guilty pleas and reduces trials, then they believe that these savings are greater than the warrant system's costs.